United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

704

No. 23,400

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID G. HARRIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,400

DAVID G. HARRIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

STATEMENT OF QUESTION PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF THIRTY (30) DAYS AND FIVE HUNDRED DOLLARS ($500.00) OR NINETY (90) DAYS UPON AN ADJUDICATED INDIGENT DEFENDANT.

This case has never been before the United States Court of Appeals for the District of Columbia Circuit with this or any other title.

REFERENCES AND RULINGS

The Appellant was convicted of maintaining a common nuisance (33 D.C. Code 3, 146) after trial by jury before Judge Austin L. Flickling on January 3, 4, 5, 1968 and later sentenced to "30 days and $500.00 or 90 days." Appellant appealed to the District of Columbia Court of Appeals and the conviction was upheld. *Harris v. U.S.*, 255 F.2d 489 (D.C. App. 1969).

STATEMENT OF THE CASE

On August 17, 1968, members of the Metropolitan Police Narcotics Squad executed a search warrant at the premises of 1842 and 1844 Monroe Street, N. W., a single residence owned and managed by Appellant (T. 31, 100 102). The arrest stemmed from the observations of an undercover police officer, Pvt. Charles, who had attended numerous marijuana parties at the residence (T. 33). The Appellant was not actually seen at any of the parties, nor observed selling or possessing marijuana, although he lived on the first floor of the dwelling (T. 102, 126-127, 145-152).

Prior to trial, the Appellant had been adjudicated an indigent and after the dismissal of his Court appointed counsel, he conducted his own defense at trial. After trial, while on bond paid for by a friend, Appellant noted an appeal to the District of Columbia Court of Appeals, contending that the lower court erred in quashing a subpoena *ad testificandum* for a witness, and that he had been denied a speedy trial. The Court found no evidence of reversible error on either contention.

The Appellant then filed a petition for leave to Appeal to the United States Court of Appeals for the District of Columbia, and the Appeal was granted on the issue of whether the sentence was valid.

ARGUMENT

I. THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF THIRTY (30) DAYS AND FIVE HUNDRED DOLLARS ($500.00) OR NINETY (90) DAYS UPON AN INDIGENT DEFENDANT.

Beginning with *Griffin v. Illinois,* 351 U.S. 12 (1956) the Supreme Court has greatly expanded the rights of indigent defendants under the 14th Amendment. Mr. Justice Black said in *Griffin,* "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* at 69. The Court has implemented these words by applying the 14th Amendment to include the right of indigent to a trial transcript, *Griffin v. Illinois,* voiding state laws that limited the ability of an indigent to appeal, *Burns v. U.S.,* 360 U.S. 252 (1959), *Eskridge v. Washington,* 357 U.S. 214 (1958), the right of counsel at trial, *Gideon v. Wainwright,* 372 U.S. 335 (1963), and on the first automatic appeal, *Douglas v. California,* 372 U.S. 353 (1963). In the Supreme Court's most recent case concerning the rights of indigent defendants, *Williams v. Illinois,* 38 L.W. 4607, Chief Justice Burger, applying the teachings of the Griffin case, found that it was a violation of the Equal Protection Clause of the 14th Amendment to incarcerate an indigent defendant *beyond the statutory maximum* because of his failure to satisfy the monetary provisions of the sentence. (Emphasis supplied) In the decision, the Chief Justice reviewed the levying of fines, and the purpose that the legislature intends in incarcerating a defendant for being able to pay fines and costs resulting from a criminal conviction, and stated

> "Default imprisonment has traditionally been justified on the grounds that it is a coercive device to insure obedience to the judgment of the Court. Thus commitment for failure to pay has not been viewed as a part of the punishment or as an increase in the penalty; rather it has been viewed as a means of enabling the Court to enforce collection of money which a convicted defendant was obligated by the

> sentence to pay. The additional imprisonment, it has been said, may always be avoided by payment of the fine." *Williams v. Illinois,* 38 L.W. 4607, *et* 4608. In light of this the Court concluded that "when the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary non-payment of a fine or cost we are confronted with an impermissible discrimination which rests on ability to pay, and accordingly we reverse." *Williams v. Illinois, supra,* at 4608.

Because imprisonment for the non-payment of fines is considered not a part of the sentence proper, but a coercive device, imprisonment works a severe hardship only on persons such as Appellant who are unable to pay. The monied defendant, has a choice of either going to jail or paying the fine but because of both the severe physical and mental hardships that incur from a term of imprisonment, the monied defendant would necessarily choose, if at all possible, to avoid the sentence and to pay the fine. The indigent defendant is presented with no choice at all. We must, in lieu of being able to pay the fine, spend time in jail, at a rate per diem, which is vastly below even the minimum wage standards. Justice Goldberg said in the New York University Law Review Vol. 39, page 221,

> "The alternative fine, imprisonment penalty still frequently imposed for petty offenses may also be unfair to the defendant without means. The choice of paying a $100.00 fine or spending 30 days in jail is really no choice at all to the person who cannot raise $100.00. The resulting imprisonment is no more or no less than imprisonment for being poor, a doctrine which I trust this Nation has long since outgrown."

As Justice Black said in *Griffin,* "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has"

(*Griffin v. U.S., supra,* at 69), the present issue is whether the kind of punishment a man gets depends on the amount of money he has. Although the Court states specifically in *Williams* that nothing we hold today limits the power of the sentencing judge to impose alternative sanctions. The Court also recognized that "the passage of time has heightened rather than weakened the attempts to mitigate the disparate treatment of indigents in the criminal process." *Williams v. Illinois, supra,* 4608. The question then presented by this appeal is whether there exists a constitutional right that attaches when an indigent is incarcerated for less than the maximum statutory provision but is so incarcerated because of non-payment of fines and costs that he is unable to pay. The appellant has no choice in determining whether to avoid imprisonment or not "the sentence rests solely on his ability to pay." *Williams v. Illinois, supra,* at 4609.

Title 33, D.C. Code 146 is "a law non-discriminatory on its face but grossly discriminatory in its operation." The Statute applied to Harris clearly works in invidious discrimination solely because of his inability to pay the fine. On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement, but for the Defendant, this choice is only illusionary. He cannot possibly pay the fine in one lump sum to avoid the additional period of imprisonment. Since only a convicted defendant with access to funds can avoid the increased imprisonment, the D.C. Statute in operative affect exposes only indigents to the risk of imprisonment. By making the maximum confinement contingent upon one's ability to pay, the state has visited different consequences on two categories of persons both subject to the same law.

The effect of incarcerating the Defendant for 60 days for his inability to pay a $500.00 fine is placing a value on the Defendant's labor of only $8.33 per diem. This figure is far below the minimum wage that the

Defendant could earn if he were not incarcerated. Thus the statute has the effect of incarcerating the Defendant for not being able to pay the fine, and when incarcerated, valuing his labor at such a low rate as to make it a violation of equal protection, as it individually classified the Defendant as one whose worth to society is below that which the Government has set as the minimum wage.

Circuit Judge Edgarton in *Wildeblood v. U.S.*, 109 U.S. Appeals D.C. 163 (1960), issued a strong dissent on the question of alternative sentencing and expressed disfavor with the fact that the issue was seldom able to be appealed. "When the person sentenced cannot pay the fine and is therefore imprisoned, the constitutional question arises. The answer seems clear . . . The Supreme Court has repeatedly held that invidious discriminations and the administration of criminal justice are unconstitutional. Specifically, the Court has held that there can be no equal justice when the kind of a trial a man gets depends on the amount of money he has. Few would care to say there can be equal justice where the kind of punishment a man gets depends on the amount of money he has. That this continues to happen in the Griffin era does not imply that it could withstand appellate review; it escapes review. A defendant who goes to jail because he cannot pay a fine seldom has means to appeal." Even though now Defendant certainly can appeal, if bond had not been provided his stay in jail would have been ended before his appeal could have been heard, thus rendering the case moot.

As to the solution of how the state may enforce a money judgment against an indigent the solutions are many and as the Supreme Court said in Williams "the state is free to choose from the variety of solutions already proposed and, of course, it may devise new ones." 38 L.W. 4609. The fine and cost could be collected through an installment plan as is

currently used in several states. Calif. Penal Code Section 1205: Michigan Statutes Annotated Section 28.1075; Pennsylvania Statute Annotated Title 19, Section 953 to 956. The trial judge could also impose a parole requirement on an indigent that he do specified work during the day to satisfy the fine. Cf. 50 U.S.C.A. 456. Therefore, it is clear that alternatives offered to the state are numerous. In the case at bar, the statutory alternatives in the several states have special interest, because the Defendant is presumably employable, and could possibly meet his obligation through the installment plan or work parole.

Appellant would finally invite the Court's attention to 18 USC, 3569, "Discharge of indigent prisoner," which, in essence, provides for the release of any person sentenced by a court "established by enactment of Congress" if the prisoner has been sentenced to a fine and/or imprisonment, and has remained in prison for more than thirty (30) days because of his inability to pay the fine. While the Act provides that the prisoner must not have more than $20.00 in property and does require an Affidavit of such facts, it is submitted that the Act would apply to the instant case and render the sentence imposed illegal from its inception.

The District of Columbia Court of General Sessions has been ruled a court falling within the ambit of the Act, *Sawyer v. District of Columbia,* 238 A.2d 314 (1968), and the Appellant had been adjudicated an indigent by the lower court when appointed counsel. This law alone would negate any portion of Appellant's alternative sentence that exceeded thirty (30) days.

In addition, it would appear that the Act has been applied to permit installment payments and immediate release. *U. S. v. Baird,* 241 F.2d 170 (2d Circuit, 1957). While *Baird* involved acquiescence on the Government's part in agreeing to the payments it would equally appear that the Court

found no necessity to seek legislative approval of the installment payments, and equally apparent that the $20.00 limitation did not apply since the fine was in excess of $20.00. To the extent, therefore, that the prisoner's assets are less than the alternative fine, the application of the statute would clearly be arbitrary and discriminatory on its face, as well as, in its operation.

CONCLUSION

For the foregoing reasons, and such reasons that may be further advanced by Reply Brief and in oral argument, Appellant prays this Court remand this case to the lower court, for re-sentencing.

Respectfully submitted,

Of Counsel:

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,466

DAVID G. HARRIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District of Columbia Court of Appeals

(DCCA No. 4787)

THOMAS A. FLANNERY,
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* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

The following issue is presented:

Was the alternative sentence of 30 days in jail and a fine of $500 or 90 days in jail a valid sentence?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,400

DAVID G. HARRIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District of Columbia Court of Appeals

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was the owner and manager of rooming houses at 1842 and 1844 Monroe Street, N.W. and following undercover activities of a metropolitan police officer which lead to seizure on August 18, 1967 of several bags of marihuana there, among other things, appellant was charged and later convicted by jury of maintaining a common nuisance in violation of D.C. Code 1967, § 33-416. He was sentenced February 9, 1968 to 30 days imprisonment and $500, or 90 days imprisonment. His conviction was affirmed by the District of

Columbia Court of Appeals, July 17, 1969. *Harris* v. *United States*, 255 A.2d 489. The petition for allowance of an appeal to this Court, which raised several alleged errors, was granted April 1, 1970 but limited to an issue raised *sua sponte* by this Court (prior to *Williams* v. *Illinois*, 399 U.S. 235 (1970)) regarding the validity of the alternative sentence imposed in this case.

ARGUMENT

The alternative sentence of 30 days in jail and a fine of $500 or 90 days in jail was valid.

Appellant has taken the position that the imposition of the sentence upon him, "an adjudicated indigent defendant," [1] was invalid. (Appellant's brief, pp. 3-8). He principally relies upon *Williams* v. *Illinois*, 399 U.S. 235 (1970) where the Supreme Court held that a state may not under the Equal Protection Clause of the Constitution subject convicted defendants to a period of imprisonment beyond the statutory maximum solely because of indigency. We cannot agree for several reasons.

Appellant's mere assertion that he was an indigent cannot go without challenge on this record. Neither prior to nor at the time of sentencing does it appear that appellant occupied the status of an indigent. While he was initially appointed counsel by the court, whom he had dismissed in deciding to conduct his own defense, it does not appear that that appointment was made under the Criminal Justice Act (18 U.S.C. § 3006A) as would be the case if the accused were indigent and unable to pay a modest attorney's fee.[2] Rather, the contrary appears. He owned and operated the rooming houses at 1842 and 1844 Monroe Street, N.W., where the instant marihuana seizures were made. Though any other sources of income are not apparent on the record appellant has been at liberty at all times relevant in this case—before trial,

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[1] See statement of the issue, Appellant's brief, p. 1.

[2] See Information, D.C. Court of General Sessions.

after conviction, and throughout all appellate stages.[3] Accordingly there appears in our view some question as to whether this appellant stood before the sentencing court as an indigent convicted person.

Nonetheless, even assuming that he is or was an indigent, his sentence was clearly valid. He was sentenced to 30 days and $500 or 90 days. The maximum penalty he could have received was one year imprisonment or $100-$1,000 fine, or both. 33 D.C. Code § 423. Since his punishment did not in any event *exceed* the statutory maximum, it was valid. See *Williams* v. *Illinois, supra* (maximum sentence of one year's imprisonment and a $500 fine (plus court costs) invalid where an indigent unable to pay the fine was obligated to remain in jail

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[3] We note in pertinent part the letter of appellant's counsel dated April 22, 1970 (filed April 24, 1970) in response to the granting of the petition for an appeal to this Court:

> I have notified Mr. Harris of the Court's action and Mr. Harris informs me that he is not, in fact, an indigent *at this time* and that he would be able to pay a fine of $500.00 in the event his sentence was affirmed. In addition, Mr. Harris requests that the Court remove him from the indigent list and allow him to continue his case with prepayment of his fees and costs, including the past payment of the transcript of the proceedings in the District of Columbia Court of General Sessions. (Emphasis original.)
>
> It has been *some two years* since Mr. Harris was sentenced [February 9, 1968] and *during that time* he has had a job and earned sufficient money that he does not feel that he can continue before the Court as an indigent. (Emphasis added.)
>
> Until very recently, Mr. Harris was, in fact, an indigent without sufficient funds to prosecute this case. * * *

Compare *Lucas* v. *United States, supra,* where the court observed:

> Aside from counsel's representation of his client's indigency to the trial judge at the time of sentencing, various indicia of appellant's indigent status appear in the record. These include: incarceration for failure to make bond, both after his arrest and on appeal; representation by a Criminal Justice Act-appointed attorney; proceeding in forma pauperis on appeal, including preparation of the transcript at Government expense; and appellant's testimony on cross-examination that prior to his arrest he had been making $152.00 every two weeks and supporting a wife and three children on that salary. 268 A.2d at 525 n. 1.

beyond the one year sentence to work the fine off at the rate of $5.00 a day); *Lucas* v. *United States*, 268 A.2d 524 (D.C. App. 1970) (where the maximum penalty for petit larceny was a $200 fine or one year imprisonment, or both, the indigent's sentence of 360 days and a $200 fine, or in default of payment an additional 360 days, was illegal for exceeding the maximum penalty in aggregate confinement); *Sawyer* v. *District of Columbia*, 238 A.2d 314 (D.C. App. 1968) (where the maximum penalty for jaywalking was a $300 fine or imprisonment of 10 days, or both, an indigent's sentence of $150 or 60 days of imprisonment, was invalid since the term of imprisonment was 50 days *in excess* of the maximum penalty which could have been imposed). As the Supreme Court stated in *Williams*:

> We hold only that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. 399 U.S. at 243.

Finally, apart from the wholly dispositive fact that all terms of imprisonment here were within the statutory maximum, we note that appellant would be subject to the *additional* 90 day imprisonment only if he failed to pay the $500 fine. This would be *default imprisonment* and was recognized in both *Williams*[4] and *Sawyer*[5] as valid. In *Williams* it was said:

> Default imprisonment has traditionally been justified on the ground that it is a coercive device to ensure obedience to the judgment of the court [footnote omitted]. Thus, commitment for failure to pay has not been viewed as a part of the punishment or as an increase in the penalty; rather, it has been viewed as a means of enabling the court to enforce collection of money that a convicted defendant was obligated by the sentence to pay. The *additional*

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[4] *Supra* at 240.

[5] *Supra* at 315.

imprisonment, it has been said, may always be avoided by payment of the fine (footnote citation).[6] (Emphasis added.)

We conclude appellant's sentence was valid in all respects here.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District of Columbia Court of Appeals, affirming the conviction and sentence of appellant, be upheld.

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United States Attorney.

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[6] The citation is to *Peeples* v. *District of Columbia*, 75 A.2d 845 (D.C. App. 1950). There the maximum penalty authorized for drunkenness in a public place was $100 or 30 days imprisonment and defendant was sentenced to 150 days in default of a $75 fine. The sentence of alternative imprisonment which *exceeded the statutory maximum* that could have been imposed, was valid. *Contra*, *Lucas* v. *United States*, *supra*. (Even had appellant's aggregate confinement here exceeded the maximum of a year, under *Peeples* it would be valid, but *Peeples* seems overruled by *Lucas sub silentio*).

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,400

DAVID G. HARRIS,

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UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,400

DAVID G. HARRIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF

ARGUMENT

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF THIRTY (30) DAYS AND FIVE HUNDRED DOLLARS ($500.00) OR NINETY (90) DAYS UPON AN INDIGENT DEFENDANT.

As early as the 19th Century, the Supreme Court has unequivocally held that the Fourteenth Amendment to the Constitution was intended to prohibit any arbitrary deprivation of life or liberty. In *Giozza v. Tiernan*, 148 U.S. 657,

662 (1893), Mr. Chief Justice Fuller held, "undoubtedly it (the Fourteenth Amendment) forbids any *arbitrary* deprivation of life, liberty or property, and secures equal protection to all under like circumstances in their enjoyment of their rights." (emphasis added). See also: *Jones v. Brim*, 165 U.S. 180, 182 (1897). In the instant case, the imposition of a sentence which requires an indigent defendant to pay a fine under penalty of further incarceration amounts to an arbitrary deprivation of that defendant's liberty. Under the circumstances the defendant had no alternative but to accept the ninety (90) day incarceration term, while a defendant who was able to pay the required fine, when placed under identical circumstances, would not be forced to accept the added incarceration. It is apparent that while this law may be nondiscriminatory on its face it is grossly discriminatory in its operation, and, as such, contravenes the fundamental premise in *Giozza v. Tiernan, supra.*

Further, the Appellant contends that the statute which prescribes alternative sentencing has been misconstrued. Although it is conceded that the statutory provision does allow for such sentencing, the purpose of the provision is only to insure compliance with a judgment. For this reason Chief Justice Burger in *Williams v. Illinois*, 399 U.S. 235 (1970), held, "we wish to make clear that nothing in our decision today precludes imprisonment for *willful* refusal to pay a fine or Court costs." (emphasis added). Therefore, to impose the ninety-day incarceration on an indigent defendant who has *not* willfully refused to pay but is only unable to pay, violates the spirit and content of the statutory provision.

Court imposed fines should be treated in the same manner as court costs with respect to indigents. In *Williams v. Illinois, supra,* the Court stated, "what we have said regarding imprisonment for *involuntary* nonpayment of fines applies with equal force to imprisonment for *involuntary* nonpayment of court costs." (emphasis added). Therefore, the Court has placed court costs and court fines in the same category. Since this Court has often held that requiring an indigent defendant to pay for court costs would effectively deny that defendant his right of appeal thereby violating the Fourteenth Amendment,

a similar result must be reached with Court imposed fines. To hold otherwise would be an effective denial of the defendant's freedom.

The Appellant further contends that the additional incarceration period, if imposed, would amount to involuntary servitude. It has long been the established rule that to compel service of another based upon a debt would result in slavery or peonage and is, therefore, unconscionable. *Clyatt v. United States,* 197 U.S. 207 (1905). See also *United States v. Schackney,* 333 F.2d 475 (Tenth Circuit 1969). In the instant case, the ninety (90) day penalty is based solely upon a debt the defendant is unable to pay. Further, while the Thirteenth Amendment does permit involuntary servitude as punishment for a crime, it does not allow involuntary servitude as a penalty for a defendant's impoverished condition.

This is not to say, however, that a punishment by fine and imprisonment may not be imposed upon an indigent defendant. As the Court has set forth in *Williams v. State, supra,* the fine could be collected through an installment plan subsequent to the defendant's release. See also: Model Penal Code, Sec. 7.02 (3)(a). (Proposed Official Draft of 1962.) Any supposed administrative inconvenience would be minimal, since repayment could easily be made a condition of probationer parole, and those punished only by fines could be reached through the ordinary processes of garnishment or a reasonable installment plan. *Rinaldi v. Yeager,* 384 U.S. 305, 310 (1966). Incarceration should occur only if the defendant then willfully refuses to meet these payments. It is obvious, that with additional safeguards to protect the indigent defendant, this statute could still be valid.

The Appellee's contention that the Defendant was not indigent at the time of his conviction is totally devoid of merit. The Appellant had no access to any funds, and it was for this reason, that he was appointed counsel. The assertion, by the Appellee, that the Appellant has subsequently obtained funds in no way has any bearing upon the issue presently before this Court.

In summation, the Appellant contends that, as a matter of law, he cannot be incarcerated for an additional sixty (60) days merely because he was unable to pay the Five Hundred Dollars ($500.00) fine. Rather, the Court should attempt to seek additional methods, such as the ones elaborated upon previously, to insure compliance with its judgment.

CONCLUSION

For the foregoing reasons and such reasons that were advanced in the Appellant's Brief and may be advanced in oral argument, Appellant prays this Court remand this case to the lower Court, for resentencing.

Respectfully submitted,

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